

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-6075

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
AB-S

NATIONAL LABOR RELATIONS BOARD,
Plaintiff-Appellant,
v.
COMMITTEE OF INTERNS AND RESIDENTS
and
NEW YORK STATE LABOR RELATIONS BOARD,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE

BETH ISRAEL MEDICAL CENTER
BROOKDALE HOSPITAL MEDICAL CENTER
LONG ISLAND JEWISH-HILLSIDE MEDICAL CENTER
MISERICORDIA HOSPITAL MEDICAL CENTER
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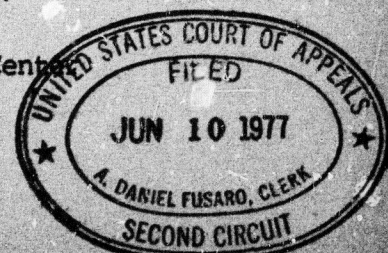
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Statement of the Issue Presented for Review

Whether the National Labor Relations Act preempts the New York State Labor Relations Board from considering charges that a non-profit hospital has refused to bargain collectively with a representative of the hospital's interns and residents in violation of the New York State Labor Relations Act and from considering petitions to be certified as the representative of such a hospital's interns and residents for purposes of collective bargaining under the State Act.

Statement of the Case

This brief is submitted by four teaching hospitals located in the City of New York (the "hospitals"),^{1/} and two New York associations of non-profit and other hospitals,^{2/} as amici curiae, in support of the appeal of plaintiff National Labor Relations Board from a decision of the United States District Court for the Southern District of New

1. The four hospitals are Beth Israel Medical Center, Brookdale Hospital Medical Center, Long Island Jewish-Hillside Medical Center and Misericordia Hospital Medical Center.

2. The two associations are the Hospital Association of New York State ("HANYS"), made up of virtually all the non-profit and governmental hospitals in the state, and the Greater New York Hospital Association, which is affiliated with HANYS and serves as co-ordinating agency for the programs of hospitals in the New York metropolitan area.

York, per Judge Charles E. Stewart, Jr., finding that the National Labor Relations Act does not preempt the states from extending collective bargaining rights to a private non-profit teaching hospital's interns, residents and clinical fellows ('interns and residents').

We adopt the basic statement of facts presented by the NLRB in its brief at pages 2-8 but wish to add the following points. First, as to terminology we call the Court's attention to the explanation of certain key terms contained in Cedars-Sinai Medical Center, 223 NLRB No. 57 (1976). An intern is a medical school graduate serving his first period of graduate medical training in a hospital; a resident is a physician who has completed an internship and is serving a period of more advanced training, lasting from 1 to 5 years, in a speciality; a clinical fellow is a physician who has completed an internship and a residency and is taking an educational postgraduate program to qualify for certification in an identifiable subspecialty of medicine. A teaching hospital is a hospital which offers graduate medical training programs in medicine or another specialty, or in a subspecialty of medicine, to interns, residents and clinical fellows.

Second, with respect to the related state administrative and court proceedings the following additional detail should be helpful. The NLRB's motion for a preliminary injunction, served with the complaint on or about November 16, 1976 and denied by

the District Court in its decision, sought (i) to enjoin defendant Committee of Interns and Residents ("CIR") from requesting, or attempting by pending state-court proceedings to require, defendant New York State Labor Relations Board ("State Board") to consider unfair-labor-practice charges of refusal by three of the hospitals represented on this brief to bargain collectively with the CIR as the representative of their medical interns, residents and clinical fellows in violation of the New York State Labor Relations Act ("State Act"), and a petition to certify the CIR as the representative of the fourth hospital's interns and residents for purposes of collective bargaining under the State Act, and (ii) to enjoin defendant State Board from considering those refusal-to-bargain charges and that representation petition, or any matters involving interns and residents.

The CIR had filed its charges and petition with the State Board shortly after the NLRB, on March 19, 1976 had dismissed a representation petition filed by a union of interns and residents on the ground that the interns and residents whom the union claimed to represent were not "employees" for the purposes of collective bargaining under the NLRA because their "relationship with Cedars-Sinai is an educational rather than an employment relationship," Cedars Sinai Medical Center, 223 NLRB No. 57 at p. 9 (1976), rearg. den., 224 NLRB No. 90 (1976). The State Board dismissed the charges and petition filed against the hospitals represented on this brief because of doubt as to whether it had

jurisdiction (see 426 F. Supp. at 442). The CIR then, on August 30, 1976, commenced state-court proceedings against the State Board (in which the hospitals intervened and the associations have participated as amici) to compel the State Board to process the dismissed charges and petition, ibid.

On October 14, 1976, the state court directed the State Board to process the charges and petition, acting in reliance on language in an NLRB decision which the court took to mean that the NLRB meant to leave the states free to regulate in this area; the court later vacated its own decision and judgments when the NLRB clarified its position in Kansas City General Hospital ("Kansas City 2"), 225 NLRB No. 14A (Nov. 8, 1976). Committee of Interns and Residents v. New York State Labor Relations Board, 388 N.Y.S.2d 509 (Sup. Ct., N.Y. Co., Oct. 14, 1976) ("Gellinoff 1", vacated, 391 N.Y.S.2d 503 (Sup. Ct., N.Y. Co., Jan. 6, 1977 ("Gellinoff 2"), rearg. den., 391 N.Y.S.2d 503 (Sup. Ct. N.Y. Co., Jan. 20, 1977) ("Gellinoff 3")^{3/}.

Judge Stewart's decision issued January 31, 1977 and was filed on February 2, 1977. On February 4, 1977, the State Board announced that pursuant to Judge Stewart's decision it would resume proceedings but would take no further action on the CIR's charges and petition until final determination of the NLRB's appeal herein, Miscericordia Hospital Medical Center, et al., 40 SLRB No. 7. On May 6, 1977, however, immediately

3 The hospitals appealed "Gellinoff 1", but, after "Gellinoff 2 and 3" vacated "Gellinoff 1", withdrew their appeals. The CIR appealed "Gellinoff 2 and 3", but, since Judge Stewart's decision, has ceased to prosecute that appeal, though it is still pending.

after the NLRB filed its notice of appeal, the State Board granted a motion by CIR for it to resume processing of the proceedings "immediately," Miscericordia Hospital Medical Center, et al., 40 SLRB No. 26. In fact, however, as of the date of filing of this brief the State Board has not noticed or held any hearings or taken any action in any of those proceedings. It is free, pending review of Judge Stewart's decision, to resume processing of the cases at any time.^{4/}

Judge Stewart's decision thus faces the hospitals, and the associations' other teaching-hospital members, with the disturbing and anomolous prospect -- assuming that the State Board starts to proceed and is not stayed, and further assuming that it adheres to its pre-1974 decisions that interns and residents are "employees" with collective-bargaining rights under the State Act^{5/} -- of having to engage in collective bargaining with their interns and residents under the State Act at a time when the NLRB, which has primary jurisdiction over the hospitals' labor relations, has held that under the NLRA they are not employees and that such bargaining would be inappropriate.

4. Indeed, the State Board has never not been free to process and act in these cases excedpt for a brief period between November 18, 1976 and January 26, 1977 when judgments entered pursuant to "Gellinoff 2 and 3" vacating judgments earlier entered pursuant to "Gellinoff 1". For that brief period only, the State Board was under an order, issued by the Appellate Division, 1st Dept., to which the hospitals had appealed "Gellinoff 1", not to proceed. See 40 SLRB No. 26, p. 2, n. 1.

5. Long Island College Hospital, 33 SLRB No. 32 (1967); Brooklyn Eye and Ear Hospital, 32 SLRB No. 21 (1966). But see Committee of Interns and Residents v. New York State Labor Relations Board, 420 F. Supp. 826, 830 (S.D.N.Y. 1976), in which Judge Briant, in the course of remanding the CIR's state-court proceedings, which some of the hospitals had removed, back to the state court, suggested that the State Board construe the State Act's definition of "employee" so as not to conflict with the federal act.

The amici hospitals and associations are vitally concerned that engaging in collective bargaining with interns and residents under the State Act^{6/} will have a seriously disruptive effect on the collective bargaining they must conduct under the National Act -- i.e., bargaining with representatives of other professionals as well as with representatives of technical and service personnel.

Perhaps the most serious potential for conflict arises out of the compulsory arbitration provisions of the State Act. Section 716(3) and (4) provide for submission of disputes between non-profitmaking hospitals and their employees to "final and binding arbitration" at the request of both parties to the dispute "or by the industrial commissioner upon his own motion and upon certification by [the New York State Mediation Board] that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful." § 716(3)(b). If New York State were to impose binding arbitration upon disputes between teaching hospitals and their interns and residents, it is difficult to see how the federally required process of free collective bargaining between the hospitals and their NLRA employees -- nurses, technicians, maintenance workers, etc. -- could remain unaffected.

What was awarded through arbitration could well set

6. Two essentially similar state acts, Minnesota's Charitable Hospitals Act (Minn. Stat. §§ 179.35-179.39), and the Massachusetts statute (Mass. Gen. Laws, ch. 150A), have been held to be inconsistent with the National Act and with the scheme delineated in it. State of Minnesota, 219 NLRB 1095 (1975); Massachusetts Nurses Association, 225 NLRB No. 91 (1976).

the pattern for the entire health care industry in New York, thereby nullifying Congress' preference for free collective bargaining, assisted only if necessary, under the 1974 amendment to the NLRA, § 213, by the fact finding and recommendations of a "Board of Inquiry" which has no power to bind the parties. Indeed, under the National Labor Relations Act it is an unfair labor practice to insist to impasse on binding arbitration of a dispute. NLRB v. Columbus Printing Pressmen & Assistants Union, 543 F.2d 1161 (5th Cir. 1976). Yet binding arbitration of disputes between hospitals and their interns and residents would eventually lead to arbitral awards which, though limited by their terms to the CIR unit, would inevitably affect NLRB established units and thus intrude into what Congress intended to be a free process of collective bargaining.

Other potential interference with collective bargaining between hospitals and their NLRA employees, who interact on a day to day basis with interns and residents, arises from the facts that under the State Act (i) the scope of collective bargaining between hospitals and their interns and residents may well be broader than the federal law requires, (ii) unions of interns and residents would be free to refuse to bargain in good faith and free to exert pressures on the hospitals, including secondary boycotts, without fear of unfair labor practices charges, which may not be filed against unions under the State Act; (iii) unions of interns and residents could insist on a closed shop or on unreasonable initiation fees which are

prohibited by the NLRA but not by the State Act; and (iv) supervisors might be included in the bargaining unit of interns and residents although this is expressly prohibited under the federal law.

In short, the amici believe that not only would mandatory collective bargaining under state law between hospitals and their interns and residents conflict directly with national labor policy as articulated by the NLRB but that it would have the potential to seriously interfere with the conduct of the collective bargaining that is to take place in the health care industry under the auspices of the NLRB. On both counts, permitting the State Board to proceed will go far to nullify the choice made by Congress when it enacted the 1974 Amendments to the NLRA and thereby gave the NLRB exclusive jurisdiction over large non-profit health care institutions.

Third, this Court should be aware of a related action pending in the District of Columbia. On March 3, 1977, over a month after Judge Stewart's decision and nearly a full year after Cedars-Sinai, CIR and other organizations representing interns and residents filed an action in the nature of mandamus in the United States District Court for the District of Columbia to compel the NLRB to accord collective bargaining rights to interns and residents. The complaint seeks specifically to set aside Cedars Sinai, and other NLRB decisions in the identical vein, including a decision, St. Clare's Hospital and Health Center, 223 NLRB 1002 (1976), motion for reconsid. and rehearing denied,

229 NLRB No. 158 (1977), dismissing the CIR's petition to the NLRB for certification as the representative under the National Act of the interns and residents at a New York hospital, one against which the CIR has not filed a State Board charge or petition, or state-court proceedings. Physicians National House Staff Ass'n v. Murphy, D.D.C. Civil Action No. 77-0358 (Flannery, J.).^{7/}

To this date, however, the CIR has failed to file a National Board charge or petition against any of the five amici hospitals, or to commence any action in New York for judicial determination of the question whether the particular interns and residents involved in this case are NLRA "employees" and, if they are, whether they form units appropriate for purposes of collective bargaining under the NLRA. No procedure exists for a hospital to obtain NLRB or judicial determination of those two questions. It appears to be the CIR's tactic to avoid determination of those two questions with respect to the hospitals involved in this action, and, for so long as these questions remain undetermined, to compel the hospitals into collective bargaining willy-nilly under New York law.

7. The present status of the CIR's District of Columbia action is that the National Board has answered, but no application is pending before the Court.

Argument

Judge Stewart Erred in Finding that
the NLRA Does Not Preempt the States
from Extending Collective Bargaining
Rights to Interns and Residents.

A. The States Are Preempted from Taking
Action that Conflicts with the Federal
Scheme of Labor Relations.

The law of preemption applicable to the field of labor relations starts with the recognition that Congress has legislated broadly in this field and that the Court must be sensitive to opportunities for conflict between state regulation and the national labor policies that are reflected in the federal legislation and in the application of that legislation by the NLRB. As the Supreme Court has explained:

The principal of preemption that informs our general national labor law was born of this Court's efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude, so far as reasonably possible, conflict between the exertion of judicial and administrative power in the attainment of the multifaceted policies underlying the federal scheme.

Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971).

The District Court failed to recognize that the law of preemption in the field of labor relations, unlike the law of preemption in other fields where federal legislation is less pervasive, starts with this principle. Thus Judge Stewart mistakenly began his analysis of the preemption question with

the statement that "Preemption of state regulation occurs where there is a clear manifestation of congressional intent to occupy the field and supersede the state's exercise of power." 426 F. Supp. at 447 (emphasis added).^{8/} For this proposition, which assumes there is no preemption unless the courts are able to find a clear manifestation of congressional intent, Judge Stewart did not cite a single labor case, but instead relied on two non-labor cases. One, New York Department of Social Services v. Dublino, 413 U.S. 405 (1973), holds that federal standards governing the federal contribution to welfare programs did not preclude New York State from insisting on additional "work rules." The other, Schwartz v. Texas, 344 U.S. 199 (1952), holds that the Federal Communication Act's prohibition on wiretapping did not prevent the states from using evidence obtained in violation of the Act in a state criminal trial. Both cases (unlike the labor cases) involved instances where Congress has legislated with respect to particular issues against a background of pervasive and continuing state regulation (in the welfare or criminal law fields). The Supreme Court has taken a different approach to preemption in the field of labor relations, where federal regulation is pervasive. Here, preemption applies wherever there is potential conflict with the federal scheme. Lockridge, supra; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

8. Compare New York Tel. Co. v. New York State Dept. of Labor, ___ F. Supp. ___, 73 Civ. 4557, p. 24 (SDNY 1977), where Judge Owen did start with the principle enunciated in Lockridge, quoted above.

B. State Board Proceedings against the Hospitals Would Conflict with the Federal Scheme under Both the CIR's View that Interns and Residents Are Entitled to Collective Bargaining Rights as "Employees" under the NLRA and the NLRB's View that They Are Not "Employees."

1. If Interns and Residents Were "Employees" under the NLRA, All Agree There Would Be Preemption.

There is no dispute that if interns and residents were "employees" within the meaning of the NLRA, as the CIR is contending in the District of Columbia, the State Board would be preempted from considering the CIR's representation petition and refusal to bargain charges. In that situation the NLRB would assume jurisdiction of the petitions and charges. Judge Stewart recognized that in this situation there would be preemption. CIR does not contend to the contrary, and the cases permit no other conclusion. E.g., Garner v. Teamsters Local No. 776, 346 U.S. 485 (1953); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

CIR is therefore asking this Court to find there is no preemption on a basis which is diametrically opposed to what the CIR is presently contending in another federal court. We consider below whether, on the basis from which CIR proceeds in this Court, there is, as it contends, no preemption.

2. If Interns and Residents Are Not "Employees" Under the NLRA Because Their Relationship with the Hospitals Is an Educational One Rather Than an Employment One and It Is Contrary to National Labor Policy for Them to Have Collective Bargaining Rights in That Relationship, State Extension of Those Rights Would Conflict with National Policy.

- (a) Where the NLRB Has Determined that It Would Be Contrary to National Labor Policy for a Group to Have Collective Bargaining Rights, the State May Not Extend Collective Bargaining Rights to that Group, as Bethlehem Steel Decided.

If the premise of the preemption question is that, as the NLRB has decided, interns and residents are not entitled to collective bargaining rights under federal law, this case is governed by a small body of cases treating the question of when and how far the states may regulate relations between employers and those who, for reasons of national labor policy, do not have collective bargaining rights under federal law.

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947), one of the very first labor preemption cases, was the first to make clear that states are preempted from extending collective bargaining rights where the NLRB has determined that it would be against national labor policy for the NLRB to accord such rights.

Bethlehem arose at a time when the NLRA did not contain its present day exclusion of supervisors from the

definition of "employee".^{9/} In a series of decisions leading to Bethlehem, the NLRB held that no unit containing foremen, who were and are regarded as supervisors, would be certified. E.g., Maryland Drydock Co., 49 NLRB 733 (1943).^{10/} In this way, the Court noted, "their desire to organize was frustrated by the policy of the National Board." 330 U.S. at 770. The foremen of Bethlehem then filed petitions with the New York State Labor Relations Board, which entertained the petitions and permitted the foremen to organize as a bargaining unit.

The law of preemption in the labor field had not then evolved to the point reflected in the general statement from Lockridge, quoted above, p.10. The Supreme Court was unanimous in concluding, however, that the failure of the National Labor Relations Board to find units including foremen appropriate to collective bargaining preempted the State Board from doing so

9. In 1947 the Act was amended so as specifically to exclude "supervisors" from the definition of "employees" in § 2(3), to define the term supervisor in § 2(11), and to provide in § 14(a) that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. §§ 152(3), 152(11), 152(14a).

10. In a later series of decisions, approved in Packard Motor Co. v. NLRB, 330 U.S. 485 (1947), the NLRB did certify foremen's bargaining units. The history of the supervisors issue as dealt with by the Board, the Supreme Court and Congress is briefly reviewed in NLRB v. Bell Aerospace Co., 416 U.S. 267, 277-80 (1974).

because the National Board's failure to certify had "the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," 330 U.S. at 774.

As the Supreme Court explained in terms as applicable to this case as it was in Bethlehem:

[I]f both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections, and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. But the power to decide a matter can hardly be made dependent on the way it is decided.

330 U.S. at 775 (citations omitted). In this case, as in Bethlehem, "the NLRB has jurisdiction of the industry in which these particular employees are engaged and has asserted control of their labor relations in general," 330 U.S. at 776. It is, to use the terms quoted above, "asserting a discretionary control" over labor relations in this industry, "conducting hearings, supervising elections and determining appropriate units for bargaining."

Judge Stewart held, however, that the rule of Bethlehem Steel does not apply to the present case because

the scope of the Board's power to interpret and administer the Act must necessarily be limited by the boundaries of the Act itself. Therefore, once the Board determined that housestaff are not "employees" it had no power to exercise over them and had no jurisdiction over them which it could decline to assert.

426 F. Supp. at 450.

We believe the District Court erred in insisting on a mechanistic view of the way in which the Board must interpret and administer the Act. In the District Court's view, the very action by which the NLRB determines that persons seeking to invoke the Board's jurisdiction are not "employees" prevents the Board from declaring national labor policy with respect to them, notwithstanding that the decision that the individuals are not "employees" is itself a reflection of national labor policy. What this view fails to recognize is that the task of deciding whether certain workers are "employees" within the meaning of the NLRA properly requires an analysis of the purposes of the Act and determinations as to national labor policy. The NLRB engaged in just this process in Cedars-Sinai Medical Center and in Kansas City 2, supra, p. 4, as well as more recently in denying rehearing in St. Clare's Hospital and Health Center, 229 NLRB No. 58, see infra, pp. 19-20.

- (b) Whether Interns and Residents are
"Employees" under the NLRA Properly
Depends on a Determination of
National Labor Policy.

The NLRB could not, consistent with its responsibilities, have avoided articulating national labor policy in the course of determining whether "employee" includes interns and residents. The statutory definition of employee is circular for present purposes, stating broadly only that "the term 'employee' shall include any employee" and then stating a number of specific

inclusions and exclusions,^{11/} none of which is applicable here.

Accordingly, in order to determine whether interns, residents and fellows are "employees" within the meaning of the NLRA, the National Board had to, and did, undertake an extensive consideration of the facts, law and policy involved. Following extensive hearings before hearing officers, the Cedars-Sinai case and three other cases presenting similar facts and issues were transferred by the Regional Directors for the regions in which the cases arose to the National Board itself for decision. The National Board heard oral arguments in all these cases, and briefs were filed both by the parties and by two amici-curiae -- the Association of American Medical Colleges (also an amicus on this appeal) and the Physicians National Housestaff Association (also a party to the action in the District of Columbia, Physicians National House Association v. Murphy, supra, which seeks review of the National Board's determinations in Cedars-Sinai and related cases).

More than six months after oral argument was heard, on March 19, 1976, the NLRB rendered its decision. The NLRB reviewed the extensive record that had been compiled on the

11. The statutory definition of "employee", section 2(3), specifically includes only "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." The definition specifically excludes only "any individual employed as an agricultural laborer or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual employed as a supervisor or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 29 U.S.C. § 152(3).

graduate medical education and training of physicians under standards prepared by the Council on Medical Education and approved by the American Medical Association and found a number of important facts applicable to interns and residents generally. Rather than quote the NLRB's decision at length, we urge the Court to read it in its entirety because nothing better shows the NLRB's process of decision.

We quote here only the National Board's conclusion that collective bargaining should not determine the incidents of the relations between hospitals and their interns and residents since it is primarily an educational one.

[W]e do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. Instead, we find that the interns, residents, and clinical fellows who filed the petition herein are primarily engaged in graduate educational training at Cedars-Sinai. It is the educational relationship that exists between the housestaff and Cedars-Sinai (a teaching hospital) which leads us to conclude that the housestaff are students rather than employees, i.e., that the housestaff's relationship with Cedars-Sinai is an educational rather than an employment relationship.

223 NLRB No. 57 at 9.

The policy-oriented approach towards interpretation of the statute reflected in both the majority and dissenting opinions in Cedars-Sinai, which avoids defining terms in a vacuum, and focuses on the purposes for which the definition is to be made, was continued and made even more explicit in the NLRB's

opinion in Kansas City 2, supra. There the Board explained that underlying its decision in Cedars-Sinai and sister cases was the determination, in the exercise of statutory discretion, that "to extend [hospital residents and interns] collective bargaining rights would be contrary to [national labor] policy." 225 NLRB No. 14A at 5.^{12/}

Most recently the NLRB has provided further amplification of the national labor policies underlying its treatment of interns and residents. In St. Clare's Hospital and Health Center, 229 NLRB No. 158 (1977) the Board denied CIR's motion requesting reconsideration and rehearing, and explained that its denial of collective bargaining rights to interns and residents reflected a general policy of doing so in cases where "students perform services at their educational institutions which are directly related to their educational program," 229 NLRB No. 158 at 7. In this category of cases, the Board explained

[T]he mutual interests of the students and the educational institutions in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective bargaining process.

* * *

12. It bears notice that while Member Fanning objected in Kansas City 2 to the majority's determination that the states were preempted from extending collective bargaining rights to interns and residents, in Cedars-Sinai he had pointed to "the clearly stated congressional conviction that labor relations in the vital health care industry is best governed by this statute," 223 NLRB No. 57 at 25, and had made no reference to any possibility that state statutes might possibly be permitted to fill the gap which he considered the majority to have created.

From the standpoint of national labor policy, subjecting academic decision making to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment. From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly well suited to academic decision making. The inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would, in our judgment, prove detrimental to both labor and educational policies.

229 NLRB No. 158 at 8, 9.

The Board's reference to a feared detriment to labor policies that might result from the injection of collective bargaining into a primarily educational relationship is especially pertinent. The institution of collective bargaining was not developed for application to an educational relationship. Its application there could detrimentally affect the collective bargaining relationship between the educational institution and its NLRA employees, and the institution of collective bargaining itself. Under the particular provisions of New York State law that potential danger is clear and immediate, as explained above at 6-8.

The NLRB's policy-oriented approach towards exercising its statutory responsibilities in Cedars-Sinai and succeeding cases follows the path approved by the United States Supreme Court more than thirty years ago in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). There the Court, in accepting the NLRB's determination that "newsboys" were employees within the

meaning of the Act, despite the possibility of their being considered independent contractors at common law, set out the basic approach to be used by the Board in applying statutory terms where the language of the statute is not itself determinative, and delimited the courts' role in interfering with determinations made by this approach. The Court's opinion in Hearst establishes that, where the statute does not provide more specific guidance, the NLRB's decision as to whether the term "employee" applies to particular groups involves significant policy determinations with which the courts must be slow to interfere.^{13/}

[T]he broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as "employee," "employer," and "labor dispute," leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classification.

* * *

Everyday experience in the administration of the statute gives [the NLRB] familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The

13. The precise holding of Hearst that those considered at common law to be independent contractors might nevertheless be regarded as "employees" under the NLRA was superseded by the 1947 amendment to § 2(3) which specifically excluded "independent contractors" from the definition of employee. However, the validity of the Hearst approach to statutory interpretation where specific guidance is missing was not thereby impugned. See NLRB v. United Ins. Co., 390 U.S. 254, 256 (1968).

experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board.

322 U.S. at 129, 130 (citations omitted).

The District Court rejected justifications of the sort approved in Hearst and advanced by the NLRB in Cedars-Sinai and Kansas City 2 as irrelevant to the preemption question. Judge Stewart reasoned that "the impact which collective bargaining might have on the 'student-teacher relationship' and the education experience . . . may be a legitimate concern of education policymakers, but this is surely beyond the scope of any national labor policy," 426 F. Supp. at 453 (emphasis in original).

The District Court erred, we believe, in failing to recognize that those considerations are relevant to both educational and labor policy, as the NLRB points out in St. Clare's, supra p.22. When the subject is labor relations at educational institutions educational and labor policy cannot be divided into separate hermetically sealed containers.

(c) The Rule of Bethlehem Steel Applies to this Case.

Given the rationale, as explained in Cedars-Sinai and succeeding cases for the NLRB's determination that interns and residents are not "employees", and the necessary implication of that rationale, as specifically stated in Kansas City 2, that the states are precluded from extending to interns

and residents collective bargaining rights which the NLRB has decided it would be contrary to national labor policy to extend under the NLRA, there is no warrant for the District Court's conclusion, quoted above, p. 15, that the principle of preemption applied in Bethlehem does not govern. To use the District Court's own statement of that principle, with the addition of a few words to aid clarity, preemption applies here precisely because "the Board has declined to exercise its jurisdiction [to certify units of interns and residents] on the ground that it would not effectuate the policies of the Act to do so." 426 F. Supp. at 447.

Bethlehem differs from the present case only in the sense that there the National Board had refused to certify units containing foremen not on the stated ground that as a matter of national labor policy foremen were not "employees," but on the ground that as a matter of national labor policy units that included foremen were not appropriate for bargaining purposes.

The difference is insubstantial. In both cases the NLRB refused to recognize collective bargaining rights for a particular group explicitly in the exercise of its discretion and for reasons of national labor policy. In fact, the Board had not in the Bethlehem situation explicitly held that supervisors were "employees", but rather had criticized that conclusion, Maryland Drydock Co., 49 NLRB 733, 739 (1943), and had avoided its implications, according precisely the same treatment to

supervisors as would have been accorded to them if they were not "employees". Indeed, one may question whether the NLRB's denial of collective bargaining rights to supervisors was compatible with any conclusion other than that supervisors were "not employees". See NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) holding that "managerial employees" are not entitled to collective bargaining rights under the NLRA because they are not statutory "employees". It is significant that when, after the NLRB had changed its policy and certified foremen's unions, Congress wished to make clear its intention that supervisors not be extended collective bargaining rights, it did so by excluding them from the definition of employee (as the NLRB did with interns and residents in Cedars-Sinai) and made clear as well, in § 14(a) of the Act, that state laws could not require a different result (just as the NLRB indicated with respect to interns and residents in Kansas City 2).

This case is precisely the same case as would be presented if Congress had excluded supervisors from the definition of employees but had neglected to specify in § 14(a) that state laws were preempted, and the New York State Labor Relations Board was preparing to require employers to engage in collective bargaining with a union representing supervisors. In that case there could be no doubt that the State Board's action would be precluded by the national policy determination, implicit in the congressional exclusion of supervisors from the definition

of "employee", that employers should not be compelled to engage in collective bargaining with supervisors (who are deemed by the national labor policy to be in their work part of management). The same results would obtain, for the same reasons, if the states sought to compel employers to bargain with "managerial employees", who, by dint of the Supreme Court's understanding of national labor policy, are also not "employees" for purposes of the NLRB certification. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

So here there can be no doubt that employers cannot be compelled to engage in collective bargaining with interns and residents (who are deemed by the national labor policy to be, in their work, primarily students). In all these cases the judgment has been made by competent authority that a collective bargaining relationship would be inappropriate.^{14/} Once that judgment is recognized and accepted as a valid statement of national policy the case for preemption becomes an easy one:

"Obvious conflict, actual or potential, leads to easy judicial exclusion of state action." Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955) quoted in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240 (1959).

14. Compare § 2(3)'s specific exclusion of agricultural laborers where no judgment has been made as a matter of national labor policy that a collective bargaining relationship is inappropriate. Here, the states are not precluded. Farm Workers v. Superior Court, 4 Cal.3d 556, 77 LRRM 2208 (1971); M & H Fruit & Vegetable Corp. v. Doe, 80 Misc.2d 1012 364 N.Y.S.2d 413 (Sup. Ct. Queens Co. 1975).

(d) Other Cases Following Bethlehem Steel
Have Found Preemption Where the Exer-
cise of State Jurisdiction Would
Violate National Policy.

The approach to preemption taken in Bethlehem was followed and extended in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). In Bethlehem the Supreme Court had left open the question of whether there was preemption when the NLRB elected "to decline jurisdiction for budgetary or other reasons." 330 U.S. at 776. That question was answered affirmatively in Guss. The Supreme Court held that a state labor board could not consider unfair labor practice charges filed against an employer whose business affected interstate commerce and was, therefore, within the purview of the NLRA even though the NLRB had declined to consider the charges on the ground that the operations of the employer were predominantly local in character.

The Supreme Court applied a broad rule to the case, holding that

Congress, by vesting in the National Labor Relations Board jurisdiction over labor relations matters affecting interstate commerce, has completely displaced state power to deal with such matters where the Board has declined or obviously would decline to exercise its jurisdiction but has not ceded jurisdiction pursuant to the proviso to § 10(a) of the National Labor Relations Act.

353 U.S. at 2-3.

The Supreme Court's reliance in Guss on the preemptive implications arising from the NLRB's not ceding jurisdiction to the states under the proviso to Section 10(a) of the NLRA is especially relevant to the present case.

The proviso to section 10(a) came into the NLRA as part of the 1947 Taft-Hartley amendments. It was a direct response to Justice Frankfurter's special concurrence in Bethlehem in which he decried what he saw as suggestions in the majority opinion that the NLRB would not be able to work out cooperative arrangements with state labor boards whereby the states could assume jurisdiction when the NLRB did not wish to do so but had no objection to state jurisdiction. 330 U.S. at 1032.

The proviso to Section 10(a) empowered the NLRB

by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation, except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statutes applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

29 U.S.C. § 160(a).

It is significant that Congress did not provide for the states to assume jurisdiction over every relationship to which the NLRB declined to apply the provisions of the Act; the NLRB would have to decide to cede jurisdiction before the states could exercise it. Nor did Congress permit the NLRB to cede jurisdiction whenever the NLRB decided to do so; the NLRB is not permitted to cede jurisdiction where "the provision of the State or Territorial statute applicable to the determination of such cases by

such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Thus, it is plain that Congress contemplated situations where the NLRB would not extend the protections of the NLRA to a certain group and where the states would still be preempted from acting -- because the NLRB chose not to cede jurisdiction, or under the circumstances was not permitted by the statute to do so.

One state, Minnesota, with a statute that is in all essential respects the same as New York's, has requested that the NLRB cede its jurisdiction over labor relations in private non-profit hospitals, but the NLRB has denied the petition on the ground that the Minnesota statute is inconsistent with the National Act. State of Minnesota, 219 NLRB 1095 (1975).

The Judgment of the District Court below, however, would permit the states to exercise jurisdiction over a critical segment of the labor relations of private non-profit hospitals even though, as the NLRB has decided, Congress forbids the NLRB from ceding such jurisdiction to the states.

The present case is an easier one for preemption than was Guss, where the fact that the NLRB had not ceded jurisdiction to the states played so large a role. In Guss the NLRB had declined to take jurisdiction itself because the amount of interstate business done by the employer did not meet the NLRB's jurisdictional standards. In the present case the NLRB's decision not to accord collective bargaining rights is based on a much more

fundamental policy. The approach of Guss, therefore, applies with even greater force.^{15/}

The basic approach of Bethlehem and Guss was also followed in a somewhat different setting in Beasley v. Food Fair of North Carolina, 416 U.S. 653 (1974). There the Court held, in a case involving the 1947 amendments which specifically excluded supervisors from § 2(3)'s definition of employee and enacted § 14(a) (set out above, p. 14, n. 9), that the states were preempted from providing a damage remedy for supervisors who were discharged for belonging to a union. Beasley held for preemption because application of the state law would "flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees." 416 U.S. 653, 662. A similar national policy, as we have seen, has been

15. The precise result of Guss (though not the judicial approach to preemption which it exemplifies) was superseded by the enactment in 1958 of § 14(c) of the NLRA which explicitly authorizes the NLRB to "decline to assert jurisdiction over any labor dispute affecting any class or category of employers, where in the opinion of the Board the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction," § 14(c)(1), and further provides that "nothing in this Act shall be deemed to prevent or bar [state courts or agencies] from assuming or asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection to assert jurisdiction," § 14(c)(2). In the present case, of course, the NLRB is asserting jurisdiction over non-profit hospitals that do a substantial business and has not decided that any labor disputes at such hospitals have an insubstantial effect on commerce. Thus, section 14(c), like § 10(a), discussed above, pp. 27-28 provides no basis for the states to exercise jurisdiction over non-profit hospitals, and the inapplicability of that provision, along with the inapplicability of § 10(a), provide additional reasons why the states may not assert jurisdiction of the sort the New York State Labor Relations Board would assert over non-profit hospitals.

reflected by the NLRB in its determinations that interns and residents are not "employees" -- just as supervisors are not "employees", although for different policy reasons. A state requirement that hospitals bargain with interns and residents would just as clearly flout a declared national policy here as would enforcement of the state law in Beasley.

- (e) This Case May Also Be Governed by the Rule Followed in Hanna Mining that States May Be Preempted from Ordering Collective Bargaining Yet Not Precluded from Affording Other Remedies That Are Consistent with the Federal Scheme.

The same approach to preemption was also followed, nine years before Beasley, in Hanna Mining Co. v. Marine Engineers, 382 U.S. 181 (1965), although this time the decision was against preemption. There the Supreme Court held, as Beasley later recognized, that "Section 14(a) does not wholly foreclose state regulations respecting the status of supervisors," Beasley, supra, 416 U.S. at 657. More specifically, Hanna held that the states were not preempted from enjoining secondary picketing by a supervisor's union aimed at imposing representation on unwilling supervisors. 382 U.S. at 193, n. 14.

The Court rejected the union's contentions in Hanna that the NLRA's specific exclusion of supervisors from the definition of employee and the provisions of Section 14(a) "signify a federal policy of laissez-faire towards supervisors," 382 U.S. at 189, that would preclude a state injunction against picketing

by a supervisor's union. The Court held that "Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees," ibid. Similarly, the NLRB has made clear that its intention in considering interns and residents not to be employees was precisely to give effect to a national labor policy to relieve hospitals from any compulsion to bargain with them. Assuming the NLRB will be upheld in its application of the NLRA -- as NLRB v. Hearst Publications, Inc., supra, p. 20-22, indicates -- the State Board must be precluded from compelling employers to bargain with the CIR.

Judge Stewart aptly characterized Hanna as a case in which the court found the national labor policy to dictate that "the labor relations of particular entities not be subject to the provisions of the NLRA, or any comparable state labor statutes, but not to preclude application of all state laws," 426 F. Supp. at 448. This description would seem also to fit the present case if, as seems likely -- though the question is not presented in this case -- there are some other state laws regulating hospital-graduate medical student relations that are not preempted by the 1974 health care amendments to the NLRA because they complement, rather than conflict, with the federal scheme. ^{16/}

16. There are certainly indications in the decided cases that some provisions of state law applicable to hospital-graduate medical student relations might avoid preemption. Hanna Mining, supra, p. 30, so indicates in its holding that the states may enjoin peaceful picketing by a supervisors' union even though the states are precluded from requiring employers to bargain with supervisors.

Footnote continued/

Judge Stewart failed to apply the rule he saw reflected in Hanna to the present case because he misapprehended the nature of the national labor policy invovled in Cedars-Sinai and Kansas City 2. "[W]e think it clear enough", he wrote, "that the Board reached its decision on the basis of its conclusion that persons who are 'primarily students' should not be afforded collective bargaining rights under the Act and should be unregulated by all labor laws, state and federal". 426 F. Supp. 452.

Since the District Court was unable to find any national labor policy requiring this result, it held that the preemption doctrine enunciated in Hanna, as well as in Teamsters, Local 20 v. Morton, 377 U.S. 252 (1964), and Machinists v. Wisconsin Emp. Rels. Comm'n, 96 S.Ct. 2548 (1976) did not apply, 426 F.Supp. at 453. It is no surprise that the District Court was unable to find the policy it was looking for because, as a full reading of Cedars-Sinai

Footnote continued/

Most recently in Farmers v. United Bhd. of Carpenters and Joiners, 97 S.Ct. 1056 (1977) the Court held that the states were not precluded from awarding damages to a union member for intentional infliction of mental distress by a union and its officials where the tort is "either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened." 97 S.Ct. at 1066. The Court explained "Our cases indicate that . . . inflexible application of the [preemption] doctrine is to be avoided, especially where the state has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." 97 S.Ct. at 1064. The year before, the Court reaffirmed that "federal labor policy as reflected in the National Labor Relations Act as amended has been construed not to preclude the States from regulating aspects of labor relations that involve 'conduct touch[ing] interests so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act,'" Machinists v. Wisconsin Emp. Rels. Comm'n, 427 U.S. 132, 136 (1976) [quoting San Diego Unions v. Garmon, 359 U.S. 236, 244 (1950)].

and succeeding cases will show, the NLRB did not proceed on the basis of the conclusions which the District Court attributed to it.

As the Board explains in its denial of rehearing in St. Clare's, 229 NLRB No. 158, at 4-6, it has been willing to extend collective bargaining rights to students employed by a commercial employer in a capacity unrelated to the students' course of study, both in units with non-students, e.g. Hearst Corporation, San Antonio Lights Division 221 NLRB 324 (1975), and in units restricted to students, e.g. Six Flags Over Georgia, Inc., 215 NLRB 809 (1974). The Board, however, has not extended collective bargaining rights to students in three other categories -- where they are employed by a commercial employer in a capacity related to the student's course of study, e.g. Pawating Hospital Association, 222 NLRB 672 (1976), or where they are employed by their own educational institution, either in a capacity unrelated to their course of study, e.g. Barnard College, 204 NLRB 1134 (1973); San Francisco Art Institute, 226 NLRB No. 204 (1976), or in a capacity directly related to their course of study. This final category comprises cases involving medical interns and residents as well as psychology interns, Clark County Mental Health Center, 225 NLRB No. 105 (1976), research assistants, The Leland Stanford Junior University, 214 NLRB 621 (1974), and graduate teaching and research assistants, College of Pharmaceutical Sciences, 197 NLRB 959 (1972); Adelphi University, 195 NLRB 639 (1972).

It is in this fourth category of cases that the NLRB has explicitly addressed the question of whether the students it was denying collective bargaining rights are statutory "employees." The answer has been no -- not only in Cedars-Sinai and the other interns and residents cases, but in Clark County Mental Health Center, 225 NLRB No. 105 (1976) and The Leland Stanford Junior University, 214 NLRB 621 (1974) as well.^{17/}

Once the NLRB reaches the determination that it would be contrary to the purposes of the NLRA to recognize collective bargaining rights for certain staff, the only mechanism available under the Act for implementing this determination is to consider these staff members not to be statutory "employees." This is the determination made in Cedars-Sinai -- the culmination of a process of analysis and policy articulation, not, as the District Court suggests, a substitute for it.

In sum, the NLRB did not determine, as the District Court said it did, that "persons who are 'primarily students'

17. In Adelphi University, 195 NLRB 639 (1972) the NLRB had also found the graduate teaching and research assistants involved in that case to be "primarily students," without explicitly determining that they were therefore not "employees." However, in Leland Stanford the NLRB determined that the research assistants there involved were "not employees within the meaning of Section 2(2) of the Act," 214 NLRB 621, 623, only after first finding that "these research assistants are like the graduate teaching and research assistants who we found were primarily students in Adelphi University," ibid. In other cases, those falling within the second and third categories, the Board has not specifically addressed the question of whether the students were statutory "employees." In those two categories -- where the student is employed by a commercial employer in tasks related to his studies or is employed by the institution in which he is a student in tasks unrelated to his studies -- the Board has never made a determination that the students were statutory employees, and in at least one case has explicitly noted that it need not reach the question. Barnard College, 204 NLRB 1134, 1135, n. 5.

should not be afforded collective bargaining rights." 426 F. Supp. at 452. Clearly, the NLRB has been willing in one category of cases to afford collective bargaining rights to persons who are primarily students.

Nor did the NLRB determine, as the District Court said it did, that "persons who are 'primarily students' . . . should be unregulated by all labor laws, state and federal." 426 F. Supp. at 452. Rather, in Kansas City 2, the National Board stated its view that the same policy considerations which led it to the conclusion in Cedars-Sinai that interns and residents are not "employees" within the meaning of the NLRA applied so as to preempt the states as well from "extend[ing] them collective bargaining rights" 225 NLRB No. 14A, at 5.^{18/} When the decisions of the National Board are thus understood, the present case falls precisely within the principle of preemption followed in Hanna Mining that, as Judge Stewart recognized, preemption occurs where national labor policy requires that the labor relations of particular entities not be subject to the provisions of the NLRA or any comparable state labor statutes, but does not necessarily preclude application of other state laws regulating their relationship.

18. The District Court may have been misled by other language in the NLRB's opinion in Kansas City 2. The Board at one point says that it intended by its decision in Cedars-Sinai "to find federal preemption of the health care field to preclude states from exercising their power to regulate in this area." 225 NLRB 14A at 4. In context we think it clear that the NLRB was speaking only of the states' power to extend collective bargaining rights, the subject of the state court proceedings to which Kansas City 2 responded and the subject to which the NLRB confined its statement in the language quoted in the text above. In any event, it is for the Courts, not the Board, to determine the scope of preemption.

3. The Legislative History of the 1974 Health Care Amendments Supports the Conclusion of Preemption.

The District Court passed off the legislative history of the 1974 health care amendments as "not dispositive", 426 F. Supp. at 448. The court's review of that history, undertaken at the outset of its analysis of the preemption question, led it to find that Congress had, indeed, intended to preempt "state regulation of labor relations covered by these amendments," 426 F. Supp. at 448 but that since the NLRB had found interns and residents not employees", "the general congressional intent to preempt state regulation of labor relations covered by the 1974 health care amendments cannot encompass the labor relations of housestaff," 426 F. Supp. at 449.

We believe the District Court would have found the legislative history of the health care amendments to be more helpful if it had asked a different question of the legislative history, and at a different stage in the analysis.^{19/}

Since preemption in the field of labor law depends, not on finding a clear manifestation of congressional intent to that effect, as Judge Stewart mistakenly assumed, see above pp. 10-11, but on the court's "efforts, without the aid of explicit congressional guidance, to delimit state and federal judicial authority over labor disputes in order to preclude . . . conflict,"

19. Cf. United States v. Bass, 404 U.S. 336, 339 (1971) where the Court made clear courts should avoid "giv[ing] point to the quip that only when legislative history is doubtful do you go to the statute," quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 543 (1947).

Lockbridge, 403 U.S. at 286, quoted above at p.10, the proper time to ask a question of legislative history in this case is after an analysis of the NLRA's provisions and the NLRB's decisions thereunder have indicated, as shown above, that under settled principles of preemption, the State Board is precluded from ordering hospitals subject to the NLRA to engage in collective bargaining with their interns and residents. The proper question to ask at that time is whether the legislative history of the 1974 health care amendments indicates that this conclusion is wrong or should be reexamined.^{20/}

When that question is asked, the answer comes back quite clear. Members of Congress, particularly those on the Committees that drafted the 1974 health care amendments, knew of course that the legislation was an amendment to a pre-existing statute, that the terms of the pre-existing statute would continue to apply except where superseded by the amendment, that the NLRB had a long history of interpreting these terms, and that over the years some of the NLRB's interpretations of statutory terms had been controversial -- including the NLRB's interpretation of "employee" in the Hearst case, pp. 20-21 above, and in the supervisors cases, p. 14, n. 10 above, both of which had precipitated congressional action. Against that background it is significant that the legislative history contains not one sugges-

20. This manner of framing the question to be asked of the legislative history follows the approach recommended by Professors Henry M. Hart, Jr. and Albert M. Sacks in their materials on statutory interpretation. See Hart and Sacks, The Legal Process, pp. 1276, 1278 (Tent. Ed. 1958).

tion that any Member of Congress contemplated a situation in which action by the NLRB in interpreting the NLRA, as now amended, would leave room for the states to order employers subject to the National Act to do something which the National Board had determined, in applying the provisions of the National Act, that it was against national labor policy for employers to be ordered to do.

On the contrary, every reference in the legislative history to the issue of preemption reflects a recognition, as the District Court acknowledged, that state regulation would be preempted unless the NLRB ceded jurisdiction under § 10(a). 426 F. Supp. at 448. See 120 Cong. Rec. 12946, 12995 (Remarks of Sen. Mondale, May 2, 1974); 16899-900, 16904-906, 16908-911 (Remarks of Reps. Thompson, Ashbrook, Quie, Frenzel and Frazer, and defeat of the "Quie amendment," which would have permitted the NLRB to cede jurisdiction over the collective bargaining relationship at non-profit hospitals to states which had a substantially equivalent statute or some other statute governing the relationship which had been enacted before the 1947 Taft-Hartley amendments, May 30, 1974); 22575-576, 22581 (Remarks of Sens. Williams, Mondale and Buckley, July 10, 1974); 22942-943 (Remarks of Reps. Quie and Thompson, July 11, 1974). The recognition in the legislative history that the 1974 Amendments would preempt the states from regulating collective bargaining between non-profit hospitals and their staffs supports the conclusion reached on the basis of the analysis presented above of the decisions of the United States Supreme Court.

Conclusion

For the reasons set out above, Judge Stewart's decision should be reversed, and the NLRB granted the injunction it seeks against CIR and the State Board.

Dated: New York, New York
June 3, 1977

Respectfully submitted,

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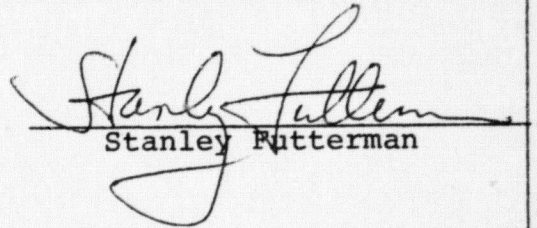
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Certificate of Service

I hereby certify that on June 6, 1977 I caused a true copy of the within Brief For Amici Curiae to be served upon Norbert M. Phillipps, Esq., General Counsel, New York State Labor Relations Board, Two World Trade Center, 33rd Floor, New York, New York 10047, by having said copy put into the United States Mail, postage prepaid.

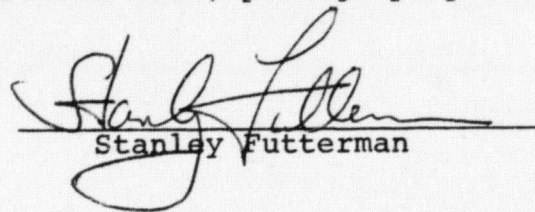

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